IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PAULA PAUL, as Executrix of the Estate of Helen F. Walker,

Plaintiff/Appellee,

v.

APPEAL NO. 33225

(Appealed from Kanawha County Circuit Court, Civil Action No. 03-C-1937)

OPTION ONE MORTGAGE CORPORATION, a corporation, and H & R BLOCK MORTGAGE CORP., a corporation,

Defendants/Appellants.

APPELLANTS' BRIEF

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I. KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

This is a Petition for Appeal from an order of the Circuit Court of Kanawha County, West Virginia ("lower court") erroneously denying Appellant's motion to file a compulsory counterclaim and a third-party complaint ("Motion").

The complaint in this civil action was filed by Helen Walker ("Walker"), to avoid foreclosure and to seek damages, civil penalties and attorney fees on the grounds, inter alia, that her purchase-money mortgage loan with H&R Block Mortgage Corp. ("HRBM") was unconscionable and that HRBM and its affiliated assignee, Option One Mortgage Corporation ("Option One") (collectively, "Appellants"), violated the provisions of the West Virginia Consumer Credit Protection Act, W. Va. Code §46A-1-1, *et. seq.*, and the West Virginia Residential Mortgage Lender, Broker and Servicer Act, W. Va. Code §31-17-1, *et. seq.* (*See* Docket Statement ("Docket') #1.)

Under the original scheduling order entered on April 27, 2004, third-party complaints were due on May 15, 2004, and the discovery cut-off date was November 1, 2004. (Docket #11.) The trial, originally scheduled for January 24, 2005, was re-scheduled to September 12, 2005.[1] (Docket #78.)

When Appellants learned that Walker's source of the down payment on the house was funds illegally obtained from the employer of Walker's daughter, Paula Walker Paul ("Paul"), Appellants promptly filed their Motion on

[1] This matter has been stayed by order of the lower court during the pendency of this appeal.

April 4, 2005.[2] (Docket #81.) On July 19, 2005, the lower court denied the Motion, ruling that it was filed too late and that good cause to extend the deadline had not been shown. (Docket #90.) It is from that order that Appellants' appeal.

[2] Walker died on May 11, 2005, after the motion to file counterclaim and third-party complaint was filed. By order dated August 1, 2005, Paul, Executrix of the Will of Helen Walker, was substituted as plaintiff. (*Docket #93.*) Helen Walker left all of her property to Paul to the exclusion of her other children. (Copy of Will is attached to *Docket #87.*)

II. STATEMENT OF FACTS

This case involves a borrower, Walker, who, assisted by her daughter, Paul, borrowed $50,100 from HRBM to buy a house on April 29, 2002. (Docket #81.) Walker and Paul then lived together in the house. (Docket #82.) A significant factor in HRBM's decision to grant Walker's loan application was that Walker was making an $18,000 down payment on the house. (Docket #82.) Walker soon defaulted in payment and then, faced with foreclosure, filed a lawsuit on August 7, 2003, against Appellants seeking cancellation of the loan, civil penalties, additional damages and attorneys' fees. (Docket #1.)

The original scheduling order entered by the lower court on April 27, 2004, provided that third party complaints were due on May 15, 2004, less than three weeks after the entry of the scheduling order, and established a discovery cut-off date of November 1, 2004. (Docket #11.) The trial was originally scheduled for January 24, 2005. (Docket #11.) Appellants deposed Walker and Paul on October 29, 2004. (Docket #31.) By agreement of counsel, Paul's deposition was completed on December 3, 2004. Both Walker and Paul testified that all the money used for the down payment was Walker's. (Walker Depo 40:20; Paul Depo 52:4, attached as Exh. A and B, respectively).

In November 2004, counsel for Appellant told Walker's counsel that they suspected something to be awry. On December 8, 2004, Appellants received subpoenaed documents from United Bank that contained documentation showing

details of questionable deposits in Paul's bank account that seemed to be inconsistent with the deposition testimony of Walker and Paul. (Docket #87.)

Appellants' counsel communicated with Paul's former employer about the financial data during December 2004. (Docket #87.) Counsel for Appellants met with Paul's former employer and provided copies of the questionable checks written on the former employer's accounts and deposited in Paul's bank account. (Docket #87.) The former employer then began its investigation. (Docket #87.) On December 16, 2004, Appellants informed Walker's counsel of Appellants' suspicions and requested that Paul's deposition be re-opened to inquire into her checking account and the extent to which Paul directed deposits and draws against the account. (Docket #87.) Counsel for Walker refused. (Docket #87.)

Appellants confirmed on January 3, 2005, that Paul's former employer was investigating the checks deposited in Paul's bank account, supposedly drafted by the employer. (Docket #87.) On January 17, 2005, the former employer advised counsel for Appellants that they had obtained their bank records and that several checks to Paul were being questioned. Counsel for Appellants discussed the issue with Walker's counsel on January 26, 2005, and advised him that a counterclaim and third-party complaint might be filed. (Docket #87.)

On March 21, 2005, Paul's former employer indicated that its internal investigation was completed and that it was turning the matter over to the police. (Docket #87.) Fourteen days later, on April 4, 2005, Appellants filed their Motion to file a counterclaim and a third-party complaint. (Docket #81.) The earliest hearing date for the Motion that could be obtained was July 6, 2005. (Docket #84.)

Walker was permitted to file a written response to the Motion a day after the hearing, on July 7, 2005. (Docket #86.) Nearly four months after the Motion was filed, on July 19, 2005, the lower court entered its order denying the Motion, ruling that it was filed too late without good cause being shown. (Docket #90.) It is from that order that Appellants' appeal. (Docket #99.)

Appellant's appeal gives this Court the opportunity to provide guidance regarding the interplay between Rule 13 (compulsory counterclaims), Rule 14 (third-party complaints), Rule 15 (amendment of pleadings), and Rule 16 (scheduling orders).

III. ASSIGNMENT OF ERROR

Petitioners seek an appeal on the following single issue:

A. **WHETHER THE LOWER COURT ABUSED ITS DISCRETION IN DENYING APPELLANTS' MOTION TO FILE A COMPULSORY COUNTERCLAIM AND A THIRD-PARTY COMPLAINT BASED UPON THE IDENTICAL FACTS GIVING RISE TO THE COMPULSORY COUNTERCLAIM WHERE (1) BOTH APPELLEE AND THE PROPOSED THIRD-PARTY DEFENDANT CONCEALED THE FACTS DURING DISCOVERY, (2) COUNSEL DILIGENTLY PURSUED THE NEWLY-DISCOVERED FACTS TO CONFIRM THE SOURCE AND ILLEGALITY OF THE MONEY USED FOR THE DOWN PAYMENT, (3) APPELLEE IS NOT PREJUDICED BY GRANTING THE MOTION, AND (4) JUSTICE REQUIRES THAT APPELLEE AND THE PROPOSED THIRD-PARTY DEFENDANT NOT BE PERMITTED TO EITHER PROFIT FROM THEIR CONCEALMENT OR TO AVOID THE CONSEQUENCES OF THEIR ILLEGAL AND FRAUDULENT ACTS.**

IV. POINTS AND AUTHORITIES RELIED UPON

West Virginia Cases

Federal Cases

Rules

V. DISCUSSION OF LAW

A. The Standard of Review is Abuse of Discretion.

The standard of appellate review in a case of this nature is an abuse of discretion standard. In Syllabus Point 1 of *Jones v. Sanger,* 217 W.Va. 564, 616 S.E.2d 573 (2005), this Court stated:

> [a] trial court is vested with a sound discretion in granting or refusing leave to amend pleadings in civil actions. Leave to amend should be freely given when justice so requires, but the action of a trial court in refusing to grant leave to amend a pleading will not be regarded as reversible error in the absence of a showing of an abuse of the trial court's discretion in ruling upon a motion for leave to amend.

See also, Syl. pt. 2 of *State ex rel. Leung v. Sanders*, 213 W. Va. 569, 575, 584 S.E.2d 203 (2003) (addressing Rule 14 of the West Virginia Rules of Civil Procedure). In *Sanders*, this Court stated:

> [i]n general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them. ... We have also cautioned, however, that we will not simply rubber stamp the trial court's decision when reviewing for an abuse of discretion.

584 S.E.2d at 209 (citations omitted).

In the present case, the lower court abused its discretion in denying Appellants' Motion. First, Appellants satisfied the "good cause shown" requirement of Rules 14(a) and 16(b) of the West Virginia Rules of Civil Procedure[1] for modification to the scheduling order and filing a third-party complaint after the 10-day grace period.

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[1] For the sake of brevity, all citations to a "Rule" shall be to the West Virginia Rules of Civil Procedure.

Second, Appellants satisfied the requirements of Rules 15(a) and 13(f), which permit amendment to the pleadings in order to assert a compulsory counterclaim. Accordingly, this Court should reverse the lower court's ruling and direct it to grant Appellants' Motion.

1. The Lower Court Abused its Discretion in Denying Appellants' Motion to File their Third-Party Complaint Against Paul because Appellants Satisfied the Requirements of Rules 16(b) and 14(a).

Rule 16(b) governs scheduling orders and Rule 14(a) governs when a defendant can bring in third parties. This Court has not had an opportunity to rule on the interplay between Rules 14 and 16. Sanders, 584 S.E.2d at 208 n.4. However, in the present action, Appellants satisfied the requirements of both Rule 16(b) and 14(a) and should be permitted to file their third-party complaint against Paul.

a. Appellants' Diligence in Pursuing their Claim Against Paul Satisfies Rule 16(b)'s Good Cause Requirement.

Under Rule 16(b), it is mandatory for a trial court to enter a scheduling order that limits the time to join other parties and to amend the pleadings. Rule 16(b) also states that "[a] schedule shall not be modified except by leave of the judge." In *State ex rel. Pritt v. Vickers*, 214 W.Va. 221, 588 S.E.2d 210, 216 (2003), this Court adopted a "good cause" standard for modification of scheduling order deadlines. '[T]rial courts should not permit parties to obtain extensions absent a showing of good cause.'" *Pritt*, 588 S.E.2d at 216 (citations omitted).

"Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the extension. The [trial court] may modify the pretrial schedule 'if it

cannot reasonably be met despite the diligence of the party seeking the extension.'" *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) (cited with approval by *Pritt*, 588 S.E.2d at 216). The focus should be on the moving party's reasons for seeking the modification.2 *Id.*

The lower court abused its discretion in finding that Appellants failed to show good cause. The scheduling order in this case mandated that all third-party complaints were to be filed and served on or before May 15, 2004, which was less than three weeks after the scheduling order was filed. Appellants filed their Motion on April 4, 2005, and despite their failure to meet the scheduling order's deadline, Appellants were diligent in pursuit of their claims against Walker and Paul. Importantly, the delay in filing is not attributable to any negligence or wrongdoing on the part of Appellants – quite the opposite. The facts giving rise to the counterclaim and third-party complaint were discovered in December 2004 by happenstance – after Walker could not remember and Paul misrepresented the source of the money.

In December 2004, Appellants obtained subpoenaed documents showing details of questionable deposits into Paul's bank account, contacted Paul's former employer about the financial data, and met with Paul's former employer, providing copies of the questionable checks. The former employer then began its investigation.

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[2] Although not binding on this Court, substantial weight is given to federal cases in determining the meaning and scope of the West Virginia Rules of Civil Procedure. *Brooks v. Isinghood*, 213 W. Va. 675, 584 S.E.2d 531, 538 (2003).

Counsel informed Walker's counsel of Appellants' suspicions and requested that Paul's deposition be re-opened to inquire into her checking account and the extent to which Paul directed deposits and draws against the account. Counsel for Walker refused.

In January 2005, Appellants confirmed that the former employer had obtained bank records and several checks were being questioned. Counsel for Appellants again discussed the issue with Walker's counsel and advised him that a counterclaim and third-party complaint might be filed.

On March 21, 2005, Paul's former employer indicated that it was turning the matter over to the police, at which point Appellants felt comfortable with making the serious allegations contained in the Motion. Fourteen days later, on April 4, 2005, Appellants filed the Motion to file a counterclaim and a third-party complaint. Due to no fault of Appellants, the earliest hearing date for the Motion that counsel could obtain was July 6, 2005. Walker was then permitted to file a written response to the Motion a day after the hearing on July 7, 2005. Therefore, on July 19, 2005, the lower court denied Appellants' Motion as being untimely filed without good cause to extend the deadline.

Filing the Motion was not a matter to be taken lightly. As soon as suspicions surfaced, Appellants subpoenaed records and contacted the former employer. Because of the nature of the acts alleged and the criminal overtones, Appellants needed to verify that they were on a solid legal and evidentiary footing before filing the Motion. Appellants had no control over the time taken by the former employer to complete its investigation, but within 14 days of the date on which the former employer advised that

the matter was being turned over to police, Appellants filed their Motion. Moreover, counsel for Walker was immediately advised of the new development in December 2004, and again advised in January 2005. For that reason, Walker cannot claim surprise that the Motion was filed.

As demonstrated above, Walker and Paul concealed the facts and did not divulge the true source of the down payment. New, accidentally discovered facts led Appellants to question the veracity of Walker's and Paul's testimony. Courts do not permit parties to benefit from their discovery violations – much less benefit from their own wrongdoing. *See Stewart v. Coyne Textile Services*, 212 F.R.D. 494, 497 (S. D. W. Va. 2003). Clearly, Appellants were diligent in their pursuit of the facts necessary to file their Motion. Accordingly, good cause was established under Rule 16(b) to permit the modification to the scheduling order because the scheduling order's deadline could not reasonably be met despite Appellants' diligence.

b. Appellants' Diligence in Pursuing their Claim Against Paul and the Lack of Prejudice to Paul Satisfies the Requirements of Rule 14(a).

The Rule 16 requirement for modifying a procedural schedule must be contrasted against the Rule 14(a) standard for filing a third-party complaint more than 10 days after serving the original answer. Under Rule 14(a), "the third-party plaintiff must obtain leave on motion upon notice to all parties to the action." Impleader will not be allowed if there is a possibility of prejudice to the original plaintiff or the third-party defendant. *State ex rel. Thrasher Engineering, Inc. v. Fox*, 218 W. Va. 134, 624 S.E.2d 481, 486 (2005) quoting Syllabus Point 5, *Bluefield Sash & Door Co. Inc. v. Corte*

Constr. Co., 158 W. Va. 802, 216 S.E2d 216 (1975), *overruled on other grounds*. Further, a party must not be dilatory in proceeding after a basis for impleader becomes clear, but some delay in third-party practice may be inevitable and there is nothing talismanic about delay alone. *Sanders*, 584 S.E.2d at 209. Courts should determine if the reason for the delay is excusable and analyze any resulting prejudice. *Id.* The Rule 14 "excusable delay and prejudice" test appears to be similar, but not identical, to the "good cause" test under Rule 14, which is analyzed in terms of diligence. Prejudice to the plaintiff and third-party defendant is an additional element that must be analyzed in connection with Rule 14 motions.

The lower court failed to consider the lack of prejudice to Walker and Paul, but even if it had, Appellants satisfy the requirements of Rule 14(a) and should be permitted to file their third-party complaint against Paul. First, Appellants were not dilatory in the pursuit of their claim against Paul, as demonstrated supra. Second, neither Walker nor Paul will be prejudiced by any perceived delay in filing the Motion. Finally, permitting Appellants to bring their third-party action against Paul will further the purpose behind Rule 14(a).

i. Neither Walker nor Paul is Prejudiced by the Third-Party Complaint.

In *Shamblin v. Nationwide Mutual Insurance Company*, this Court found that there was prejudice to the plaintiff from an untimely filing of a third-party complaint because of the "unexplained delay in filing the motion until shortly before trial" and "the strong possibility of confusion of the issues." 183 W.Va. 585, 396 S.E.2d 766, 778-779

(1990). By contrast, in *Sanders*, this Court concluded that the circuit court abused its discretion by failing to consider that no prejudice would have resulted to the plaintiff. 584 S.E.2d at 209-10. Similarly, in the present case, the lower court failed to consider that Walker and Paul would not be prejudiced by the assertion of the third-party complaint. The failure to consider that lack of prejudice is an abuse of discretion. *See Thrasher, supra*, 624 S.E.2d at 487 (defendant offered no excuse for the delay in filing, the claim would bring new complicated immunity theories into the litigation that could cause confusion, and the claim would cause a significant delay in the proceedings).

While the lower court's order focused only on good cause, Walker arguably asserted she would be prejudiced because of the insertion of issues regarding the propriety of transactions between Paul and her employer (Appellee's Response, ¶ 10) and because she was prepared to go to trial in six weeks (*Id.*, at ¶ 11). To the contrary, Appellants' claim does not incorporate such complicated issues as legal malpractice or state sovereign immunity as was the case in *Shamblin* and *Thrasher*. The only additional issues raised are whether Paul embezzled money from her employer and whether she and her mother used that money to obtain a loan under false pretenses from Option One. Therefore, unlike the claims in *Shamblin* and *Thrasher*, Appellants' claim against Paul is not likely to confuse the issues and can be readily determined along with the underlying litigation. Accordingly, there is no prejudice to Walker or Paul and the lower court's failure to consider that lack of prejudice was an abuse of discretion.

Furthermore, it is important to point out that any prejudice on the part of Paul or Walker was of their own making. This whole situation could have been resolved several months earlier had Walker and Paul been candid with their responses to deposition questions. Walker and Paul chose to do otherwise and hope that the truth would not come out. Walker and Paul should not be rewarded with a procedural windfall that finds they are prejudiced by delay.

ii. Permitting Appellants to File their Third-Party Complaint will further the Purpose behind Rule 14(a).

In Syllabus Point 3 of *Magnet Bank v. Barnette*, this Court stated that "[t]he purpose of Rule 14 ... is to eliminate circuity of actions when the rights of all three parties center upon a common factual situation." 187 W. Va. 435, 419 S.E.2d 696 (1992). That purpose would clearly be served here because the liability of both Walker and Paul arise out of identical facts: 1) the illegitimate source of the funds used for the down payment; 2) the deposit of those funds into Walker's bank account; 3) Walker's fraudulent misrepresentation; 4) use of those funds to obtain a loan from HRBM; and 5) the conspiracy to use the funds in that manner. While Appellants could arguably file a separate civil action against Paul based upon her role in the scheme, judicial economy, convenience, expense to the parties, and the purpose behind Rule 14 are better served by having all claims arising out of the loan origination tried in the same case.[3] Doing so

[3] As discussed below, Appellants' counterclaim is a compulsory counterclaim that, by necessity, must be prosecuted in the instant action.

would also have the salutary effect of avoiding the possibility of inconsistent results in different cases. *See, e.g., Howell v. Luckey*, 205 W. Va. 445, 518 S.E.2d 873, 877 (1999) ("[O]ne of the primary goals of any system of justice [is] to avoid piecemeal litigation which cultivates a multiplicity of suits and often results in disparate and unjust verdicts."). Therefore, the lower court's denial of the Appellants' motion was an abuse of discretion because granting it would further the purposes behind Rule 14(a) by avoiding circuity – and, indeed, duplication – of actions and the possibility of inconsistent results.

2. The Lower Court Abused Its Discretion in Denying Appellants' Motion to File Their Counterclaim Against Walker Because Appellants Satisfied the Requirements of Rules 13(a), 13(f) and 15(a).

Rules 13(a) and (f) govern assertion of counterclaims and Rule 15(a) governs amending the pleadings in an action. Here, Appellants satisfied the requirements of Rules 13(a), 13(f), and 15(a). Therefore, the lower court should have permitted Appellants to file their compulsory counterclaim against Walker.

a. Appellants' Counterclaim is Compulsory.

Appellants' counterclaim is compulsory and must be brought in the present action. Rule 13(a) requires that "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." In the present action, all three elements of

Rule 13 are met. First, Appellants, albeit unknown, possessed the counterclaim at the time they served their answer to Walker. Second, Appellants' counterclaim arises out of the same transaction or occurrence (the origination of Walker's mortgage) that is the subject matter of the complaint. Third, Appellants' counterclaim does not require the presence of any third parties over whom the court cannot acquire jurisdiction.

b. Justice Requires that Appellants be Permitted to Assert their Compulsory Counterclaim Against Walker.

Rule 13(f) governs omitted counterclaims under yet another standard: that "when justice requires, the pleader may by leave of court set up the counterclaim by amendment." No case appears to address a particular test for "when justice requires," although "[t]he purpose of Rule 13 is to 'prevent the fragmentation of litigation, multiplicity of actions and conserve judicial resources.'" *Sorsby v. Turner*, 201 W. Va. 571, 499 S.E.2d 300, 304 (1997) (citations omitted). This Court has previously stated that "[b]y adopting the Rules of Civil Procedure, this Court intended that all these rules be construed liberally and fairly so as to seek justice for all of the parties involved" and that "[the rules] make clear our intent to avoid placing form over substance in the procedures of our courts." *Id.*

In the present action, Appellants' failure or inability to assert their claim against Walker would constitute a waiver of the claim. *See Carper v. Kanawha Banking and Trust Co.*, 157 W. Va. 47, 207 S.E.2d 897, 920 (1974) ("[f]ailure to assert a compulsory counterclaim is a waiver and abandonment of such a claim and an adverse decision to the putative claimant is res judicata."). Appellants did not discover the

unpleasant truth about the source of Walker's down payment until well after the deadline for filing their answer.4/ Thus, Appellants could not have asserted the counterclaim when their answer was filed. Now that the truth has come to light, justice requires that HRBM and Option One be permitted to assert their counterclaim. To hold otherwise would be to place form over substance and deny Appellants the opportunity to pursue a meritorious claim. Accordingly, leave should be granted for Appellants to plead the counterclaim by amendment.

c. Appellants Satisfy the Requirements of Rule 15(a) and Should be Permitted to Amend their Pleadings to Include their Counterclaim Against Walker.

Rule 13(f) contemplates that an omitted counterclaim will be asserted "by amendment." Rule 15(a) of the West Virginia Rules of Civil Procedure provides that, after a responsive pleading has been filed, "a party may amend the party's pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires." (Emphasis added). "The point of the emphasized language is that a court should not allow a party to use a procedural device to thwart a decision on the merits." *Boggs v. Camden-Clark Memorial Hospital Corp.,* 216 W.Va. 656, 609 S.E.2d 917, 922 (2004). Recently, this Court stated:

> The purpose of the words 'and leave [to amend] shall be freely given when justice so requires' in Rule 15(a) W.Va.R.Civ.P., is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore, motions to amend should

[4] At deposition, both Walker and Paul asserted under oath that all the money used for the down payment was Walker's.

> always be granted under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue.
>
> The liberality allowed in the amendment of pleadings pursuant to Rule 15(a) of the West Virginia Rules of Civil Procedure does not entitle a party to be dilatory in asserting claims or to neglect his or her case for a long period of time. Lack of diligence is justification for a denial of leave to amend where the delay is unreasonable, and places the burden on the moving party to demonstrate some valid reason for his or her neglect and delay.

Syl. pts. 2 and 3, *State ex rel. Vedder v. Zakaib,* 217 W. Va. 528, 618 S.E.2d 537 (2005).

> "The goal behind Rule 15, as with all the Rules of Civil Procedure, is to insure that cases and controversies be determined upon their merits and not upon legal technicalities or procedural niceties." Brooks, 584 S.E.2d at 540 (citations omitted).

In the present action, Appellants satisfy all the requirements of Rule 15(a) and should be permitted to assert their counterclaim against Walker. First and foremost, the counterclaim will permit the presentation of the merits of the action. Second, Walker will not be prejudiced by the assertion of the counterclaim. Third, Walker had ample time to meet the counterclaim. Finally, Appellants have not been dilatory in asserting their counterclaim.

i. Permitting Appellants to Assert their Counterclaim Will Permit the Presentation of the Merits of the Action.

The present appeal must be granted in order to permit a presentation of the merits of Appellants' counterclaim against Walker. As the case presently stands, there is a final judgment entered subject to this appeal. The lower court did not hear any evidence or consider the merits of Appellants' counterclaim. The Motion to file the

counterclaim was denied due to the "legal technicality" or "procedural nicety" of timing. This Court has repeatedly expressed its opinion that the purpose of the language that "leave shall be freely given when justice so requires" is to ensure that there is a decision made on the merits of an action. In the present action, the only way to reach the merits of this compulsory counterclaim is for this Court to overrule the lower court's order denying Appellants' Motion to file their counterclaim and third-party complaint.

ii. Walker Will not be Prejudiced by Appellants' Assertion of their Compulsory Counterclaim

The prejudice to the adverse party that the Court is concerned with comes from the suddenness of the assertion of a new claim. *See Boggs*, 609 S.E.2d at 923 (stating "[t]here is simply no 'sudden assertion' that could prejudice the defendants"). In Boggs, the plaintiff was seeking to amend his complaint in order to correct technical errors that were made when the complaint was filed. *Id.* In holding that the plaintiff could amend his complaint, the court stated that there was no "sudden assertion" that could prejudice the defendant because the defendants knew of the events giving rise to the suit and were already on notice of the plaintiff's intent to sue based on the filing of the defective complaint. *Id.*

The facts of the present case are similar to those in Boggs in several respects. First, Walker was aware of the events giving rise to the suit when Appellants filed the Motion to assert their third-party complaint. Walker has known of the impropriety of her actions since she utilized the ill-acquired funds in order to obtain the loan from Appellants. Second, Walker was on notice of Appellants intent to bring the

claim. As soon as Appellants became aware of the potential impropriety on Walker's part, Appellants notified Walker's counsel and informed him that they were considering a counterclaim and third-party complaint if suspicions proved true. Walker cannot claim prejudice based on the suddenness of the assertion of the counterclaim when she was on notice of it as early as December of 2004. Further, the counterclaim would have been brought much sooner had either Walker or Paul been candid in their responses to deposition questioning. Accordingly, like the plaintiff in *Boggs*, Appellants should be permitted to amend their pleadings in order to assert their counterclaim against Walker.

iii. Walker had Ample Time to Defend Against the Counterclaim.

As previously stated, when the Motion was filed, trial was still five months away. Five months would have been ample time to conduct discovery on the counterclaim or to seek leave to extend that discovery deadline. Further, counsel for Walker was on notice as early as December of 2004 that the counterclaim might be filed. In other words, counsel for Walker was on notice that the Motion might be filed four months beforehand and nine months prior to trial. Accordingly, Walker had ample time to defend against the counterclaim. Moreover, if he determined otherwise, counsel for Walker could have filed a motion to extend the discovery deadline and continue the trial date in the lower court, which would have provided all parties the opportunity to pursue their rightful claims.

iv. Appellants were not Dilatory in the Pursuit of the Counterclaim

In *Dunbar Fraternal Order of Police Lodge #119 v. City of Dunbar*, this Court found a party dilatory in asserting its claims when the new claims sought to be introduced in the amended pleading "[were] or should have been known" when the initial pleading was filed. 218 W.Va. 239, 624 S.E.2d 586, 590 (2005). Further, in *Vedder*, this Court found a party dilatory in asserting its claims when the party delayed filing their motion for two years and three months from the time they "became aware" of the potential claim. *Vedder*, 618 S.E.2d at 543. This Court went on to state that a delay of ten months from the time the party became aware of the potential claim would justify the denial of leave to amend. *Id.*

In the present action, Appellants can be easily distinguished from *Dunbar* and *Vedder*. First, the counterclaim against Walker was not known and should not have been known at the time Appellants filed their answer. There was no way for Appellants to know that illegitimate funds were used as a down payment on the house. Accordingly, unlike the party in *Dunbar*, Appellants should not be found dilatory in asserting their counterclaim against Walker because it was not known and could not be known at the time Appellants filed their answer.

Second, unlike the party in *Vedder*, Appellants did not wait two years and three months or even ten months from the time they became aware of their claim to file their Motion. Rather, Appellants filed their Motion 14 days after confirming their suspicion that a counterclaim existed against Walker and only four months after they first

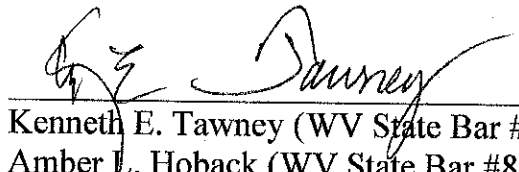
became suspicious. Accordingly, unlike the party in *Vedder*, Appellants should not be found dilatory in asserting their claim. Therefore, the lower court abused its discretion in denying Appellants' Motion to file their compulsory counterclaim against Walker because Appellants have met the requirements of Rule 15(a).

VI. RELIEF REQUESTED

Appellants request that this Court reverse the ruling of the lower court and direct that Appellants' Motion be granted.

H&R BLOCK MORTGAGE CORP.
OPTION ONE MORTGAGE CORPORATION

By Counsel



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